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CASE NO. 94-21

IN THE

Supreme Court of the United States

October Term, 1994

DAVID DUKE, *et al.*

Petitioners,

vs.

JIM SMITH,
Secretary of the State of Florida, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

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QUESTION PRESENTED

Does *Farrar v. Hobby,* 113 S.Ct. 566 (1992), entitle petitioners to an award of attorneys' fees as prevailing parties under 42 U.S.C. § 1988 where, under a presidential preference primary ballot access statutory scheme involving an initial consideration process and a separate reconsideration procedure, a court of appeals invalidates only the latter, leaving intact the First Amendment rights of political parties to determine initially who shall be on their respective ballots, thereby precluding any alteration of the litigants' legal relationship, requiring no modification of respondents' behavior, and imposing no obligation on respondents to do anything to or for petitioners?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This brief in opposition to the petition for writ of certiorari establishes that petitioners, in their effort to demonstrate entitlement to an award of attorneys' fees as prevailing parties under 42 U.S.C. § 1988, fundamentally misperceive fact and law while raising a non-issue strawman in the "capable of repetition, yet evading review" standard which has no relevance to the Eleventh Circuit's denial of attorneys' fees.

Contrary to petitioners' assertions and as clearly demonstrated by a reading of the Eleventh Circuit's attorneys' fees decision, Pet. App. A, pgs. 1a-4a, and the Court's decision on the merits, 13 F.3d 388 —

1. Petitioners were not unconstitutionally denied ballot access.

2. The Eleventh Circuit found no constitutional impediment in the initial ballot access procedure or decisions made under § 103.101(2)(a).

3. Petitioners could not have obtained injunctive relief entitling them to ballot access.

4. Respondents do not need to alter their behavior in any way as a result of the Eleventh Circuit's decision.

5. Respondents, or their successors, may again exclude David Duke from the ballot in the future in the same manner as before — through the First Amendment-protected initial ballot consideration process.

6. *Farrar* applies to declaratory and injunctive actions, in addition to damages claims.

Section 103.101, Fla. Stat., provides for two ballot access opportunities for presidential candidates to be placed on Florida's presidential preference primary ballot. Under subsection (2)(a)'s initial consideration procedure, each political party submits to the Florida Secretary of State a list of its presidential candidates for ballot placement. The Secretary of State prepares, publishes, and submits a list of these names to the Presidential Candidate Selection Committee. Those names appear on the ballot unless all committee members of the same political party as any listed candidate agree to delete a candidate's name from the ballot. In short, the Republican committee members are responsible for the Republican Party candidates, and the Democratic committee members are responsible for their party's candidates.

By subsection (2)(c), a disappointed presidential candidate may request this same committee to reconsider placing that person's name on the ballot. Only this second ballot access provision was addressed by the Eleventh Circuit; after the district court denied petitioners' declaratory and injunctive relief as to both statutory procedures, petitioners abandoned any claim as to the initial consideration procedure (and committee decisions based thereon) and argued only as to the reconsideration process.

The Eleventh Circuit's attorneys' fees denial decision carefully follows this Court's instructions in *Farrar v. Hobby*. Thus, there is no decisional conflict, and there is no question of first impression, as the "capable of repetition, yet evading review" claim is of no relevance to, and has no bearing on, that Court's disposition of petitioners' attorneys' fees effort.

STATEMENT OF THE CASE

Petitioners sought to have their names placed on the 1992 Florida presidential preference primary ballot. They submitted their names to the Presidential Candidate Selection Committee made up of respondents Jim Smith, Florida Secretary of State; T.K. Wetherell, Speaker of the Florida House of Representatives; and Gwen Margolis, President of the Florida Senate, as well as House Minority Leader James M. Lombard, Senate Minority Leader Ander Crenshaw, and Florida Democratic Party Chairman Simon Ferro and Florida Republican Party Chairman Van Poole. In accordance with § 103.101(2)(a), representatives of the two major political parties gave lists of their respective candidates for ballot placement to Secretary of State Smith. None of the petitioner candidates was on either list submitted by the parties to the Secretary of State.

Subsequently, disappointed candidates requested the Secretary of State pursuant to subsection 2(c) to have their names reconsidered for inclusion on the ballot by the committee, which reconsideration was rejected. Petitioners then filed suit seeking a declaration that § 103.101 was unconstitutional, and an injunction requiring the Secretary of State to place their names on the 1992 Florida presidential primary party ballots. This relief was denied by the district court. On appeal, petitioners voluntarily restructured their case by limiting their constitutional challenge only to the reconsideration provision. Pet. App. A, pg. 3a.

REASONS FOR DENYING THE WRIT

The Eleventh Circuit Court Of Appeals' Decision Rejecting Petitioners' Unsubstantiated Factual Allegations and Denying Their Request for Attorneys' Fees, is Wholly Consistent With *Farrar v. Hobby,* 113 S.Ct. 566 (1992) and Its Predecessors. As a Result of the Appellate Court's Decision on the Merits Invalidating Only the Presidential Preference Primary Ballot Access Reconsideration Provision and Leaving Intact the Initial Consideration Process, 13 F.3d 388 (11th Cir. 1994), Respondents Are Not Required to Alter the Legal Relationship Between the Parties, There is no Modification Whatever of Respondents' Behavior In a Way that Directly Benefits Petitioners, and Respondents Are Under No Obligation to do Anything to Accommodate Petitioners. Petitioners' "Capable of Repetition, Yet Evading Review" Argument Has no Relevance Whatever to the Eleventh Circuit's Application of *Farrar* to the Facts Here. Accordingly, the Eleventh Circuit's Decision is in Complete And Faithful Harmony With *Farrar's* Prevailing Party Standard.

Petitioners' claims of the existence of an "important unanswered question" (Pet. pg. 7) and conflict between the Eleventh Circuit's attorneys' fees decision and *Farrar v. Hobby,* ring hollow in light of the facts of this case, the particular ballot access law in question and the Eleventh Circuit's rejection of petitioners' putative factual recitations in faithfully adhering to *Farrar's* principles. In fact, the Eleventh Circuit noted that petitioners offered no substantiation for their claims (see Pet. App. A, pg. 4a regarding their unsupported claim that respondents must change

their behavior). Rather than attempt to justify their factual allegations now raised for a second time by their petition, petitioners continue to make the same unsubstantiated representations rejected by the Eleventh Circuit. As demonstrated by the Eleventh Circuit and the points set out herein, there is neither an "important unanswered question," nor is there decisional conflict. This case involves only the faithful application of the particularized facts and ballot access law here to the prevailing party standard espoused in *Farrar.*

At the outset, petitioners' attempt to create an "important unanswered question" by invoking the "capable of repetition, yet evading review" exception to mootness constitutes nothing more than a strawman masking a simple, straightforward application of the principles espoused by this Court in *Farrar v. Hobby* to the specific facts of the instant litigation. One searches in vain for any reference to, or intimation of, the application of this exception in the Eleventh Circuit's decision. Indeed, there is no such discussion precisely because it has nothing to do with the Court's application of *Farrar* to the case *sub judice.*

As the Eleventh Circuit points out, petitioners sought a declaratory judgment that § 103.101 was unconstitutional, and an injunction requiring placement of their names on the 1992 Florida presidential primary ballot. The district court denied that relief and, on appeal, petitioners argued only that the reconsideration process was unconstitutional. *Duke v. Smith,* 13 F.3d at 392. Thus, the Eleventh Circuit's holding of unconstitutionality affects only the reconsideration process and not the entire primary ballot system.

The *sine qua non* of prevailing party status supporting an award of attorneys' fees under 42 U.S.C. § 1988 is "relief (to a plaintiff) on the merits of his claim (which) *materially alters the legal relationship* between the parties by *modifying*

the defendant's behavior in a way that *directly benefits* the plaintiff." *Farrar,* 113 S.Ct. at 573. (Emphasis added.)

Farrar's holding is born of this Court's analysis of *Hewett v. Helms,* 482 U.S. 755 (1987); *Rhodes v. Stewart,* 488 U.S. 1 (1988); and *Texas State Teachers Ass'n v. Garland Independent School District,* 489 U.S. 782 (1989). *Farrar* thus represents a synthesizing of these earlier decisions. See 113 S.Ct. at 572. Under this distilled analysis, for petitioners to be prevailing parties, they must show that, as reflected by the Eleventh Circuit (Pet. App. A, pg. 3a), "'[w]hatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement.' 113 S.Ct. at 573." Technical, pyrrhic victories, or "the moral satisfaction (that) results from any favorable statement of the law" cannot bestow prevailing party status. 113 S.Ct. at 573-74.

In rejecting petitioners' claims of entitlement to attorneys' fees based solely on the invalidation of the only provision before the Eleventh Circuit — the statutory reconsideration process — the Court said:

> Although we struck down the reconsideration process, the appellant did not challenge the method by which the list of primary candidates is determined as an initial matter. In our opinion, we suggested that the initial determination process, embodied in Section 103.101(2)(a) was constitutional because "the autonomous political parties' First Amendment rights take their motivation for exclusion (or inclusion) [of potential candidates] outside the ambit of state action." *Duke,* 13 F.3d at 391 n.3. *It is through that initial determination process, which the defendants did not challenge and which we left intact, that the appellants were excluded from the 1992 primary ballot, and through which they can be excluded from any*

> *future primary ballot.* Indeed, as the appellees point out, the appellants originally had two opportunities for ballot access—the initial selection process and the reconsideration process; they have "succeeded" in eliminating one of them, effectively halving their number of opportunities for getting on the Florida primary ballot. (Pet. App. A, pgs. 3a and 3b.) (Emphasis added.)

Thus, petitioners' status as it existed before the Eleventh Circuit's decision on the merits remains unchanged, as does the status of the respondents. In short, petitioners remain not entitled to ballot placement and respondents need to do nothing further in that there is nothing further for them to do. In sum, petitioners enjoy no further entitlement or benefit than they had at the inception of the litigation, and respondents are required to do nothing further in this cause; their status is precisely what it was at the beginning of this litigation. Petitioners do not get ballot access, a declaration of entitlement to ballot access or damages. Respondents are not required to pay damages, apologize, or do anything for petitioners' benefit.

Because petitioners are in no different posture now than they were when they were initially denied ballot placement, and respondents are in no different posture now with respect to ballot placement than they were at the beginning of the litigation, petitioners are not prevailing parties because they received no direct benefit from the Eleventh Circuit's decision, and respondents are under no obligation to modify their behavior as a result of the appellate court's action.

Nevertheless, in an effort to craft decisional conflict and an issue of first impression, petitioners misperceive several facts.

First, contrary to petitioners' assertion, candidates were not unconstitutionally denied ballot access, and petitioner

Duke did not obtain a "finding that his exclusion from the ballot violated the First Amendment." (Pet. pg. 10). Only the reconsideration process was at issue; the Eleventh Circuit specifically determined that the initial ballot access determinations, unchallenged and left intact, provided for exclusion from the 1992 ballot, and may be relied on to exclude these same candidates "from any future primary ballot." Pet. App. A, pg. 3b.

Second, petitioners erroneously maintain that the Eleventh Circuit did not rule on the constitutionality of the initial ballot access provision. In *Duke v. Smith,* 13 F.3d 388, 391, fn.3 (11th Cir. 1994), the Court specifically said:

> We will not consider the procedure that the respective political parties employed in determining which candidates to submit under subsection (2)(a) *because at that stage of the process, the autonomous political parties' First Amendment rights take their motivation for exclusion (or inclusion) outside the ambit of state control.* See, e.g., *Democratic Party v. Wisconsin,* 450 U.S. 107, 123-24, 101 S.Ct. 1010, 1019-20, 67 L.Ed.2d 82 (1981); *Kuspar v. Pontikes,* 414 U.S. 51, 56-57, 94 S.Ct. 303, 307-08, 38 L.Ed.2d 260 (1973). (Emphasis supplied.)

Indeed, in its attorneys' fees decision, the Eleventh Circuit reiterates its view as to the constitutionality of the initial consideration process. Pet. App. A, pg. 3a. This clearly demonstrates that the Court recognized that the initial ballot access consideration process is a matter protected by the political parties' First Amendment rights.

Third, petitioners incorrectly aver that they could have obtained an injunction placing candidates on the ballot. Pet. pg. 10. This is not so; the Court specifically noted that the initial consideration process remains intact, and

petitioners were legally precluded from ballot access based on this provision. Pet. App. A, pg. 4a. Moreover, as the Eleventh Circuit noted, "the appellants (petitioners) originally had two opportunities for ballot access — the initial selection process and the reconsideration process; they have 'succeeded' in eliminating one of them, effectively halving their number of opportunities for getting on the Florida primary ballot." Pet. App. A, pg. 4a. Hence, petitioners had no injunctive remedy at any time.

Fourth, petitioners mistakenly represent that the respondents must change their behavior as a result of the Eleventh Circuit's decision. That simply is not the case. While the Eleventh Circuit reflected that "the appellants (petitioners) could seek to hold the appellees (respondents) in contempt were they to apply the reconsideration process...in the future(,)" this is not the kind of behavioral change required by *Farrar* in order for a plaintiff to be deemed a "prevailing party" and thereby entitled to an award of attorneys' fees. Pet. App. A, pg. 3a. The Eleventh Circuit specifically rejected petitioners' "change of behavior" argument as follows:

> The appellants argue that as a result of our ruling, "[t]he State will have to change its statute, or the Defendants will have to give relief to all candidates seeking reconsideration from Presidential Preference Primary ballot exclusion." Not so. *The appellants point to no case or constitutional principle that obligates the Florida legislature to provide an appeals process for disgruntled presidential candidates.* As a result of our holding, *there will be no means for disappointed candidates to appeal their omission from the primary ballot, unless and until the Florida legislature of its own free will decides to enact a new reconsideration mechanism. Nothing in the decision* which the appellants obtained from this Court *obliges* Florida

> to adopt a new reconsideration procedure of any type in place of the unconstitutional procedure that we struck down. (Pet. App. A, pg. 4a.) (Emphasis added.)

Against this backdrop, petitioners' criticism of the "Eleventh Circuit's speculation about how the state may choose to correct its deficient procedures" (Pet. pg. 13) exemplifies sophistry and rings a hollow note. There is absolutely no basis for petitioners' change-of-behavior claim here.

Fifth, petitioner Duke's cavalier statement that he "may not again" be excluded from the ballot is flatly contradicted by the Eleventh Circuit's leaving intact the political parties' First Amendment right to choose its candidates through the initial ballot placement process as described above.

And sixth, petitioners are in error when they intimate *Farrar* is limited to damages claims only. As this Court specifically said in *Farrar,* discussing the definition of prevailing party and citing to *Rhodes v. Stewart, supra,*

> We reaffirmed that a judgment — *declaratory or otherwise* — "will constitute relief, for purposes of 1988, if, and only if, it affects the behavior of the defendant toward the plaintiff.

113 S. Ct. at 572. (Emphasis added.)

This Court thus clearly contemplated declaratory and injunctive relief in crafting the prevailing party test. To contend otherwise simply misreads *Farrar.*

The above analysis demonstrates that each of petitioners' substantive claims are refuted by the record and/or rejected by the Eleventh Circuit.

Farrar is not limited to damage actions only; petitioners would not have been entitled to injunctive relief for ballot access in 1992, and they similarly will not be so entitled in

1996; respondents need not change their behavior in any way; and petitioners were not unconstitutionally denied ballot access.

As the Eleventh Circuit said regarding petitioners' "success" in invalidating the reconsideration process and thus halving their ballot access opportunities:

> [T]he appellants' victory is a technical one devoid of practical benefit to them. As a result of their efforts and our decision, the appellants have attained nothing more than " 'the moral satisfaction [that] results from any favorable statement of law,' " *Farrar,* 113 S.Ct. at 573-574 (quoting *Hewitt v. Helms,* 482 U.S. 755, 762, 107 S.Ct. 2672, 2676 (1987)); such satisfaction "cannot bestow prevailing party status." *Id.* at 574. (Pet. App. A, pg. 4a.)

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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